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TYING THE "NOT": THE SOUTH CAROLINA SUPREME COURT'S PROSPECTIVE ABOLISHMENT OF COMMON LAW MARRIAGE

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I. INTRODUCTION

Though South Carolina adopted the doctrine of common law marriage in 1832,[1] the 2019 decision of *Stone v. Thompson* drastically altered the course of family law jurisprudence by prospectively abolishing the institution.[2] *Stone* has immeasurable repercussions, and unfortunately, those who the decision impacts directly may not comprehend the magnitude of the abolishment until their partner passes away, their relationship splits, or tragedy strikes. Upon these occurrences, South Carolina law no longer protects relationships that are not solemnized by a formal marriage ceremony, regardless of whether the relationship qualified as a marriage under the common law regime. Take, for example, a hypothetical husband and wife named Cooper and Adeline. The couple was married on a brisk autumn evening at the Lace House in Columbia, South Carolina. Adeline's best friend, Rachel, applied to become a notary public specifically to perform the ceremony. Although neither Cooper nor Adeline were aware at the time, Rachel had not yet filed her commission. Five years later, Adeline discovered that Cooper, a successful cardiothoracic surgeon, was having an affair with his scrub nurse. Adeline filed for divorce on the basis of adultery, and on a whim, Cooper decided to check the validity of their marriage license. Regrettably for Adeline, she and Cooper were married three months after the opinion of *Stone v. Thompson*.[3] Because their marriage license was not properly notarized, their marriage was procedurally invalid. As an unemployed housewife, spoiled by the luxuries of her husband's income, Adeline was left empty-handed after his affair. Without the availability of common law marriage, Adeline had no income, no place to live, and no right to equitable distribution or alimony.

In its abolishment, the *Stone* court first evaluated the historical justifications for common law marriage, acknowledging the role of the institution during colonization and then turning to state recognition of the doctrine.[4] The court conceded common law marriage was widely accepted among states well into the 1900s yet indicated that the current trend of abolishment signifies a new era.[5] Turning toward South Carolina law, the *Stone* court claimed existing ambiguities in the institution of marriage evidenced a need for fairness and consistency: "Our quest to see inside the minds of litigants asserting different motivations and levels of knowledge at varying times must yield to the most reliable measurement of marital intent:

1. Fryer v. Fryer, 9 S.C. Eq. (Rich. Cas.) 85 (1832).
2. *See* 428 S.C. 79, 833 S.E.2d 266 (2019).
3. *Id.*
4. *Id.* at 83, 833 S.E.2d at 268.
5. *Id.*

a valid marriage certificate."[6] Although this Note contends the *Stone* usurped legislative power by abolishing common law marriage,[7] it is important to observe that the institution's outcomes served as a basis for legitimate marital benefits, including alimony, distribution of assets, estate distribution, insurance benefits and spousal coverage, visitation and custody, and many others.[8]

The drastic implications of *Stone*'s prospective abolishment are incredibly unjust, especially for couples with a genuine good faith belief in the validity of a covertly defective marriage. Prior to *Stone*, such couples had an underlying assurance that the doctrine of common law marriage ratified any defective formal marriage. After *Stone*, however, these couples cannot retroactively establish a marital relationship, which leaves them without a way to ensure protection or receive marital benefits in the case of divorce or tragedy.[9] While other states have adopted protections to safeguard good faith couples, such as putative spouse doctrine and palimony, the only existing doctrinal protection in South Carolina is the good faith exception, found in *Thomas v. 5 Star Transportation*.[10] As this Note maintains, however, the good faith exception is severely underdeveloped and rather inadequate to address the complexities *Stone* presents. In order to address the inequities of *Stone* in this regard, the South Carolina Supreme Court must expound upon the good faith exception by recognizing the doctrine's role outside of the context of bigamy, eliminating its impediment removal requirement, and sufficiently clarifying the definitional standard of "good faith." Ultimately, despite the court's seemingly clear-cut holding, *Stone* commemorates an uncertain era in family law jurisprudence—one that is riddled with unfair remedies and will, in time, require the court to adopt some form of doctrinal protection for good faith partners.

Part II of this Note describes the doctrine of common law marriage and its history before examining the *Stone* court's prospective abolishment and refined test for retroactive establishment. Part III analyzes the court's authority to abolish common law marriage and examines the future implications of such abolishment. Part IV describes the current rights of cohabitants who do not qualify for common law marriage because of *Stone*,

6. *Id.* at 86, 833 S.E.2d at 270.
7. *See infra* Part III.
8. *See infra* Section IV.A.
9. *Stone*, 428 S.C. at 83, 833 S.E.2d at 268.
10. 412 S.C. 1, 770 S.E.2d 183, 191 (Ct. App. 2015) ("If a man and woman enter into a contract of marriage believing in good faith that they are capable of entering into the relation notwithstanding a former marriage, when, in fact, the marriage is still of force, and after the removal of the obstacle of the former marriage the parties continue the relation and hold themselves out as man and wife, such action constitutes them man and wife from the date of the removal of the obstacle." (citing Davis v. Whitlock, 90 S.C. 233, 246, 73 S.E. 171, 175 (1911))).

while Part V suggests three possible doctrinal approaches that ensure equitable remedies for partners entering a marriage with mistaken belief as to its validity. Finally, Part VI concludes by recounting the myriad effects of the prospective abolishment and proposing the South Carolina Supreme Court expand and adopt the "good faith exception" found in *Thomas v. 5 Star Transportation.*[11]

II. *STONE V. THOMPSON*

In *Stone v. Thompson*, the South Carolina Supreme Court was tasked with "determin[ing] whether the family court was correct in finding Susan Thompson and Marion Stone were common law married in 1989, as well as whether Stone was entitled to an award of attorney's fees."[12] Evidently, upon analysis of the parties' relationship, the court determined it was time for South Carolina to "join the overwhelming national trend and abolish [the institution of common-law marriage]. Therefore, from [July 24, 2019] forward—that is, purely prospectively—parties may no longer enter into a valid marriage in South Carolina without a license."[13]

A. The Doctrine of Common Law Marriage

Unlike formal marriage, common law marriage does not depend on the existence of a marriage license.[14] Rather, the *Stone* court noted: "A common-law marriage is formed when the parties contract to be married, either expressly or impliedly by circumstance. The key element in discerning whether parties are common law married is mutual assent: each party must intend to be married to the other and understand the other's intent."[15] Thus, a

11. *Id.* at 1–18, 770 S.E.2d at 183–92.

12. 428 S.C. at 82, 833 S.E.2d at 267. Although the specific facts of *Stone* are irrelevant to the abolishment, a brief recitation may be helpful: Stone and Thompson began dating in the 1980s. *Id.* at 89–90, 833 S.E.2d at 271. At the time, Thompson was married to her ex-husband. *Id.* The couple divorced in 1987, and Stone and Thompson had a child shortly thereafter. *Id.* In 1989, Stone and Thompson had a second child and began living together. *Id.* The same year, Stone alleged Thompson introduced Stone as her husband at an art gallery. *Id.* at 91, 833 S.E.2d at 272. The couple lived and worked together until approximately 2009, when it was revealed Stone was having an affair. *Id.* at 90–91, 833 S.E.2d at 272. The family court identified a common law marriage beginning in 1989 according to the art gallery introduction. *Id.* Other than this allegation, there was mixed evidence in the form of witness testimony, tax documents, contracts, and banking records. *Id.*

13. *Id.* at 82, 833 S.E.2d at 267.

14. *Id.* at 83, 833 S.E.2d at 268.

15. *Id.* at 88, 833 S.E.2d at 270 (citations omitted) (citing Callen v. Callen, 365 S.C. 618, 626, 620 S.E.2d 59, 63 (2005)). "Some factors to which courts have looked to discern the parties'

common law marriage consists of two elements: (1) an express or implied contract to marry and (2) mutual intent to be married. More often than not, a common law marriage is implied by direct and circumstantial evidence, such as tax returns, living arrangements, and introductions to third-parties as "husband" or "wife."[16]

For centuries, the institution of marriage, whether formal or common law, has been marked by "an expanding list of governmental rights, benefits, and responsibilities."[17] These rights, benefits, and responsibilities apply at the state and federal levels and include:

> [T]axation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.[18]

Despite the procedural differences between formal and common law marriages, as noted South Carolina family law professor Roy Stuckey has written, "[t]he legal consequences of entering into a common law marriage are no different from the legal consequences of entering into a [formal] marriage. Marriage is marriage, and the same rights and obligations attach to either form."[19] Accordingly, a state's recognition of common law marriage inherently influences a couple's right to enjoy both state and federal marital benefits, including alimony, distribution of assets, estate distribution, insurance benefits and spousal coverage, visitation and custody, and many others.[20]

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intent include tax returns, documents filed under penalty of perjury, introductions in public, contracts, and checking accounts." *Id.* (citing Kirby v. Kirby, 270 S.C. 137, 142, 241 S.E.2d 415, 417 (1978); Barker v. Baker, 330 S.C. 361, 365, 499 S.E.2d 503, 505–06 (Ct. App. 1998); Owens v. Owens, 320 S.C. 543, 545, 466 S.E.2d 373, 375 (Ct. App. 1996); Cathcart v. Cathcart, 307 S.C. 322, 324, 414 S.E.2d 811, 812 (Ct. App. 1992)).

16. *See Stone*, 428 S.C. at 88, 833 S.E.2d at 270 ("Some factors to which courts have looked to discern the parties' intent include tax returns, documents filed under penalty of perjury, introductions in public, contracts, and checking accounts.").

17. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

18. *Id.*; *see also* Editorial, *SC Says Long-Overdue 'I Don't' to Troublesome Common-Law Marriage*, POST & COURIER (July 26, 2019), https://www.postandcourier.com/opinion/editorials/editorial-sc-says-long-overdue-i-dont-to-troublesome-common-law-marriage/article_cfc37bec-af0a-11e9-bb9b-6b1ca18b2143.html [https://perma.cc/HF76-NJSC].

19. ROY T. STUCKEY, MARITAL LITIGATION IN SOUTH CAROLINA 44 (4th ed. 2010).

20. *See infra* Section IV.A.

B. History of Common Law Marriage

The doctrine of common law marriage began in pre-Reformation Europe as a result of mounting frustrations with the formal requirements of marriage.[21] At the time, marriage was available solely to those members of wealthy and noble families[22] because, as family law scholar Göran Lind acknowledged, "[o]nly the upper class . . . had the means and the possibility of entering into ceremonial marriages."[23] Without a supporting spouse, women outside of these social circles were rarely capable of independently supporting themselves, much less any illegitimate children.[24] Eventually, common law marriage developed as an available alternative, producing the societal recognition of marriage while preserving the costs and formalities of a traditional marriage ceremony.[25]

Although the 1753 passage of Lord Hardwicke's Marriage Act[26] ceased English recognition of common law marriage, the American colonists carried their own opinions on the doctrine to the New World.[27] While some colonies abrogated common law marriage through codification, others continued to informally recognize common law marriage notwithstanding the English enactment of Lord Hardwicke's Marriage Act.[28] Upon the American Revolution, however, New York became the first state to recognize common law marriage via judicial decision, citing three English cases as its basis for doing so.[29]

Soon after New York adopted common law marriage, the doctrine swept the United States. States enacted legislation and developed case law, conceding numerous justifications for its recognition.[30] Primarily, adopting states were concerned with procedural defects that failed to satisfy the statutory requirements of formal marriage. First, because state officers and

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21. *Stone*, 428 S.C. at 83, 833 S.E.2d at 268; Ashley Hedgecock, Comment, *Untying the Knot: The Propriety of South Carolina's Recognition of Common Law Marriage*, 58 S.C. L. REV. 555, 559 (2007); Editorial, *supra* note 18.

22. Hedgecock, *supra* note 21, at 559.

23. GÖRAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 135 (2008).

24. Hedgecock, *supra* note 21, at 559.

25. *Id.* at 560.

26. As a result of the Act, "marriage was required to follow a specific procedure, putting to an end the very popular, and rather less formal, tradition of clandestine marriages." James Hardy, *The History of Hardwicke's Marriage Act of 1753*, HIST. COOPERATIVE (Sept. 14, 2016), https://historycooperative.org/the-history-of-hardwickes-marriage-act-and-the-beginning-of-the-wedding-industry/ [https://perma.cc/UN9U-VT5C].

27. Hedgecock, *supra* note 21, at 559.

28. *Id.*

29. LIND, *supra* note 23, at 139.

30. *Id.* at 140–48.

ministers were located primarily in well-populated communities, access to authorized officiants was reduced for those in distant, rural areas.[31] In tandem, state governments expressed overwhelming concern for the single mothers who depended on governmental benefits to support illegitimate and immoral children.[32] These converging concerns led states ultimately to view the doctrine of common law marriage as a necessity—recognizing the burden of harsh statutory requirements, acknowledging the risk of accidental non-compliance, and simultaneously ensuring marital benefits for those in need.[33] Despite modern access to officiants and less apprehension for dependent women and children, procedural defect is still an overwhelming concern—one which the *Stone* court overlooked.[34]

Eventually, following the lead of New York and a wealth of other states,[35] South Carolina adopted common law marriage in the 1832 case of *Fryer v. Fryer*, where the court set forth that "[o]ur law prescribes no [marriage] ceremony. It requires nothing but the agreement of the parties, with an intention that *that agreement* shall, *per se*, constitute the marriage."[36] Following judicial recognition of common law marriage, the South Carolina General Assembly enacted a statute implicitly recognizing the doctrine: "Nothing herein contained shall render any marriage illegal without the issuance of a license."[37]

Although common law marriage was widely accepted during the late 1800s and well into the 1900s, the *Stone* court noted that "the [modern] prevailing trend . . . has been repudiation of the doctrine."[38] Currently, fewer than ten states permit common law marriages.[39] As for South Carolina, the legislature has made multiple attempts to prospectively abolish common law marriage after a specified date, while simultaneously amending or repealing § 20-1-360 of the South Carolina Code to conform with the proposed

31. Hedgecock, *supra* note 21, at 560; *see also* Stone v. Thompson, 428 S.C. 79, 83, 833 S.E.2d 266, 268 (2019).

32. *See* Hedgecock, *supra* note 21, at 560 ("Most notable was the desire to protect women, and the family unit in general, by allowing financially dependent women to look to the family for financial support rather than to burden the towns.").

33. *Id.* ("[T]he physical hardships of frontier life made survival easier for married couples than for single persons.").

34. *Stone*, 428 S.C. at 79–91, 833 S.E.2d at 266–72.

35. LIND, *supra* note 23, at 140–41.

36. 9 S.C. Eq. 85, 92 (1832).

37. S.C. CODE ANN. § 20-1-360 (2014) (originally enacted as S.C. CODE OF 1912 § 3749 (Civ. Code)).

38. *Stone*, 428 S.C. at 84, 833 S.E.2d at 268.

39. *Id.*

abolishment.[40] However, of its ten attempts, the most successful attempt barely passed in the house of representatives before being introduced to the general floor of the senate at session's end.[41] Notwithstanding the legislature's attempts, until *Stone*, there was no indication the South Carolina Supreme Court was on the heels of abolishment, either.

C. Prospective Abolishment of Common Law Marriage

After examining the historical basis for common law marriage, the *Stone* court assessed the modern trend of abolishment in the United States. Although Alabama was the most recent state to abolish common law marriage via judicial opinion, the *Stone* court lent much credence to Pennsylvania's 2003 abolishment in *PNC Bank Corporation v. Workers' Compensation Appeal Board (Stamos)*,[42] whereby the Pennsylvania Commonwealth Court declared that the paternalistic motivations underpinning the doctrine of common law marriage are no longer apparent in modern society.[43] According to the *Stone* court, the current shift away from paternalism is due, in part, to the fact that, "[b]y and large, society no longer conditions acceptance upon marital status or legitimacy of children."[44]

Following its historical analysis, the court announced a general power to overrule the common law.[45] In defining its power, the court observed: "We will act when it has become apparent that the public policy of the State is offended by outdated rules of law . . . . [C]ommon-law marriage's origins lie in the common law, and consequently, it may be removed by common-law mandate, regardless of tacit recognition by our legislature."[46] Transitioning from the idea of power to the state's current policy goals, the court acknowledged that, whereas early South Carolina cases cited "immorality, illegitimacy, and bastardy" stigmatizations as the basis for common law

40. *See, e.g.*, H.B. 3925, 122nd Gen. Assemb., 1st Reg. Sess. (S.C. 2017); S.B. 11, 120th Gen. Assemb., 1st Reg. Sess. (S.C. 2013); H.B. 3588, 116th Gen. Assemb., 1st Reg. Sess. (S.C. 2005); H.B. 4597, 115th Gen. Assemb., 1st Reg. Sess. (S.C. 2004); H.B. 3625, 115th Gen. Assemb., 1st Reg. Sess. (S.C. 2003); H.B. 3774, 114th Gen. Assemb., 1st Reg. Sess. (S.C. 2001); H.B. 3452, 114th Gen. Assemb., 1st Reg. Sess. (S.C. 2001); H.B. 3668, 113th Gen. Assemb., 1st Reg. Sess. (S.C. 1999); H.B. 3656, 113th Gen. Assemb., 1st Reg. Sess. (S.C. 1999); H.B. 4410, 112th Gen. Assemb., 1st Reg. Sess. (S.C. 1998).

41. *See* H.B. 3774, 114th Gen. Assemb., 1st Reg. Sess. (S.C. 2001).

42. PNC Bank Corp. v. Workers' Comp. Appeal Bd. (Stamos), 831 A.2d 1269 (Pa. Commw. Ct. 2003).

43. *Id.* at 1279; *Stone*, 428 S.C. at 84–85, 833 S.E.2d at 268–69.

44. 428 S.C. at 85, 833 S.E.2d at 269.

45. *Id.*

46. *Id.*

marriage, these factors "are no longer stigmatized by society."[47] Additionally, the court observed that a presumption of marriage solely on the basis of cohabitation is improper due to the fact that cohabitation is progressively common among modern households.[48]

Throughout the *Stone* opinion, it is evident the court's primary concern was generating consistent outcomes in lower courts through concrete and efficient analysis.[49] Specifically, the court expressed apprehension in continually requiring trial courts to engross themselves in the determination of mutual intent to be married.[50] In determining such intent, the *Stone* court noted that "courts struggle mightily to determine if and when parties expressed [the mutual intent to be married] . . . . The solemn institution of marriage is thereby reduced to a guessing game with significant ramifications for the individuals involved, as well as any third party dealing with them."[51] As a result of the proclaimed inequities of this guessing game, the court single-handedly professed that the fundamental right to marry deducts a "right to remain unmarried [that] is equally weighty, particularly when combined with our admonitions that a person cannot enter into such a union accidentally or unwittingly."[52]

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47. *Id.* at 83, 88, 833 S.E.2d at 268, 271 (citing Jeanes v. Jeanes, 255 S.C. 161, 166–67, 177 S.E.2d 537, 539 (1970)).

48. *Id.* at 86, 833 S.E.2d at 269; *see also Jeanes*, 255 S.C. at 166, 177 S.E.2d at 539 ("There is a strong presumption in favor of marriage by cohabitation, apparently matrimonial, coupled with social acceptance over a long period of time." (citing *In re* Greenfield's Estate, 14 S.E.2d 916, 919 (W. Va. 1965))).

49. *See Stone*, 428 S.C. at 82, 85, 833 S.E.2d at 267, 269 ("We have concluded the institution's foundations have eroded with the passage of time, and the outcomes it produces are unpredictable and often convoluted. . . . [C]ourts struggle mightily to determine if and when parties expressed the requisite intent to be married, which is entirely understandable given its subjective and circumstantial nature.").

50. *Id.* at 85–86, 833 S.E.2d at 269.

51. *Id.* Conflicting evidence regarding the existence of common law marriage often creates time-consuming and costly litigation for the courts and parties. In *Thomas v. 5 Star Transportation*, 412 S.C. 1, 6, 770 S.E.2d 183, 186 (Ct. App. 2015), the plaintiff filed suit in 2008 for workers' compensation benefits after her partner's death. After more than six years of litigation determining the existence of a common law marriage, the South Carolina Court of Appeals finally issued its opinion. *See id.* at 1–17, 770 S.E.2d at 183–92. In *Callen v. Callen*, 365 S.C. 618, 627, 620 S.E.2d 59, 64 (2005), the South Carolina Supreme Court reversed the family court's award of attorney's fees in the amount of $113,405.98. Thus, this case demonstrates the vast expense of litigating the existence of a common law marriage, even at the trial level.

52. 428 S.C. at 86, 833 S.E.2d at 269 (citing *Callen*, 365 S.C. at 626, 620 S.E.2d at 63). The court was expressly worried about common myths indicating requirements that partners cohabitate for seven years or hold themselves out as being married. *See* Cynthia G. Bowman, Note, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 711 n.6 (1996); Editorial, *supra* note 18.

D. Refining the Test of Common Law Marriage

Before *Stone*, South Carolina courts applied two interchangeable and contradictory standards to common law marriage: (1) a preponderance of the evidence[53] or (2) a rebuttable presumption—based on apparently matrimonial cohabitation—which could only be overcome by "strong, cogent, satisfactory, or conclusive evidence" to the contrary.[54] Due to the nature of prospective abolishment, the *Stone* court conceded there remains a class of individuals rightfully entitled to recognition for common law marriages entered into before the issuance of the opinion.[55] However, the court expressed concern that applying the above standards created too much uncertainty.[56] Consequently, the court adopted a new standard of clear and convincing evidence to ensure that a couple cannot enter into a common law marriage unless the couple fully intended to form a marriage.[57] Under this standard, "a party [must] show a degree of proof sufficient to produce a firm belief in the allegations sought to be established."[58]

Although the *Stone* court acknowledged its ability to "retroactively . . . divest vested rights,"[59] the court reached a decision that undermined the established principles on which thousands of couples have relied. Specifically, the court adopted a prospective approach whereby "no individual may enter into a common-law marriage in South Carolina after [July 24, 2019]."[60] Rather, any marriage after this date must be manifested by a marriage license in order to be valid.[61] If a party alleges that a common law marriage was entered into prior to July 24, 2019, the party is "required to demonstrate mutual assent to be married by clear and convincing evidence. Courts may continue to weigh the same circumstantial factors traditionally

53. Tarnowski v. Lieberman, 348 S.C. 616, 620, 560 S.E.2d 438, 440 (Ct. App. 2002) (first citing Kirby v. Kirby, 270 S.C. 137, 140, 241 S.E.2d 415, 416 (1978); and then citing *Ex parte* Blizzard, 185 S.C. 131, 133, 193 S.E. 633, 634 (1937)).

54. *Jeanes*, 255 S.C. at 167, 177 S.E.2d at 540.

55. *See Stone*, 428 S.C. at 87, 833 S.E.2d at 270 ("We see no benefit to undoing numerous marriages which heretofore were considered valid in our State, and we will not foreclose relief to individuals who relied on the doctrine.").

56. *See id.* at 87–88, 833 S.E.2d at 270–71.

57. *See id.* at 89, 833 S.E.2d at 271 ("[C]onsistent with our preceding discussion regarding the sanctity of a marital relationship and our reticence to impose one on those who did not fully intend it, we believe a heightened burden of proof is warranted.").

58. *Id.* (citing *In re* Estate of Duffy, 392 S.C. 41, 46, 707 S.E.2d 447, 450 (Ct. App. 2011)).

59. Russo v. Sutton, 310 S.C. 200, 205 n.5, 422 S.E.2d 750, 753 n.5 (1992) (citing Hooks v. S. Bell Tel. & Tel. Co., 291 S.C. 41, 351 S.E.2d 900 (Ct. App. 1986)).

60. *Stone*, 428 S.C. at 87, 833 S.E.2d at 270.

61. *Id.*

considered, but they may not indulge in presumptions based on cohabitation, no matter how apparently matrimonial."[62]

III. THE ISSUE OF AUTHORITY

The legislature can undoubtedly codify a common law doctrine; however, this action would prompt the question: Did the South Carolina General Assembly do so with the passage of § 20-1-360 of the South Carolina Code?[63] The *Stone* court assumed the statute is actually not a codification, stating: "While our legislature has not expressly codified common-law marriage, it has recognized the institution by exception to the general requirement to obtain a marriage license."[64] Additionally, later on in the opinion, the court observed that because common law marriage is a purely common law doctrine, "it may be removed by common-law mandate, regardless of tacit recognition by our legislature."[65] This observation begs the questions—What exactly is *tacit legislative recognition*, and does such recognition constitute codification? Upon thorough analysis, it appears the answer to the latter is affirmative—tacit legislative recognition is effective codification.[66]

Although codification of common law marriage is rather rare, one example of a state having done so is California.[67] In 1850, the California Supreme Court first recognized common law marriage, stating: "Marriage is a civil contract, and no form necessary to its validity."[68] Subsequently, in 1872, California passed a statute codifying common law marriage: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations."[69] Despite the statute's failure to refer

62. *Id.* at 89, 833 S.E.2d at 271.

63. "Nothing contained in this article shall render illegal any marriage contracted without the issuance of a license." § 20-1-360 (2014).

64. 428 S.C. at 83, 833 S.E.2d at 269.

65. *Id.* at 85, 833 S.E.2d at 270 (citing Russo v. Sutton, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992)).

66. *See* Motsinger v. Nationwide Mut. Ins. Co., Civil Action No. 4:11-01734, 2013 WL 6179386, at *7 (D.S.C. Nov. 25, 2013) ("In South Carolina, the legality of common law marriage is codified at S.C. Code Ann. § 20-1-360 . . . ."); *In re* Estate of Smith, No. E2016-02254-COA-R3-CV, 2017 WL 4422339, at *1 (Tenn. Ct. App. Oct. 4, 2017) ("South Carolina has codified the common law marriage doctrine in section 20-1-360 of the South Carolina Code . . . ."); Hedgecock, *supra* note 21, at 556 ("South Carolina has codified the common law marriage doctrine in section 20-1-360 of the South Carolina Code . . . .").

67. LIND, *supra* note 23, at 143 ("In California, case law had supported the common law marriage doctrine since the beginning of the 1850s, but in a definitive breakthrough in 1872, the state regulated the doctrine through legislation, which was very unusual in the United States.").

68. Graham v. Bennet, 2 Cal. 503, 505 (Cal. 1852).

69. CAL. CIV. CODE § 55 (1872).

to common law marriage by name, California courts interpreted the statute to allow common law marriages. In fact, one California Associate Justice noted that "[California] statutes control the validity of marriages without regard to the common law."[70] In addition to California, Montana enacted a substantially similar statute in 1895.[71] Like the California Associate Justice, a Montana Supreme Court Justice declared common law marriage as synonymous to a statutory marriage formed by either solemnization or "a mutual and public assumption of the marital relation."[72]

Most analogous to § 20-1-360 of the South Carolina Code is the initial codification of common law marriage in the Dakota Territory, later to be divided into North Dakota and South Dakota. There, the legislature passed a session law in 1877 that codified the common law doctrine: "Marriage must be solemnized, authenticated and recorded as provided in this article; but non-compliance with its provisions does not invalidate any lawful marriage."[73] Upon the establishment of South Dakota as its own individual state, the Supreme Court of South Dakota conducted a thorough discourse, assessing the role of this statutory exception within the scheme of formal marriage requirements.[74] Specifically, evaluating a statutory title similar to the licensure requirement of South Carolina, the court in *In re Svendsen's Estate* noted:

> What other interpretation can be put upon this [statutory exception] than that any marriage which complies with [the statutory requirements of a personal relationship arising out of a civil contract and consent followed by a mutual assumption of marital rights, duties, or obligations] will be valid regardless of failure to conform to those requirements looking to the solemnization, authentication, and recording of the marriage?[75]

Although antiquated in its application due to South Dakota's statutory amendment prospectively abolishing common law marriage as of July 1,

70. Coon v. Joseph, 237 Cal. Rptr. 873, 878–79 (Cal. Ct. App. 1987) (Barry-Deal, J., concurring).

71. MONT. CIV. CODE § 1-1-50 (1895) ("Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual and public assumption of the marital relation.").

72. *See* O'Malley v. O'Malley, 129 P. 501, 502 (Mont. 1913).

73. The Revised Codes of the Territory of Dakota § 45 (1877).

74. *See In re* Svendsen's Estate, 158 N.W. 410 (S.D. 1916).

75. *Id.* at 413.

1959,[76] perhaps the *Stone* court should have regarded this opinion for guidance.

It is widely accepted that a doctrine enacted and regulated solely by the judiciary is clearly common law based.[77] However, when an otherwise common law doctrine has been acknowledged by the legislature and subsequently codified, there is doubt as to the judiciary's exclusive authority over the doctrine.[78] Upon codification of a common law doctrine, the judiciary no longer has authority to develop a robust area of case law.[79] Rather, the judiciary's role shifts to that of an interpreter of statutory law.[80] Recognizing its role as an interpretive body after codification of a common law doctrine, the South Dakota court in *In re Svendsen's Estate* impressively avoided a usurpation of legislative power by observing:

> [W]e are not in the happy position of the common-law jurist who, untrammeled by statutory enactment, was free, when declaring what the law was, to give due weight to the changes wrought by advancing civilization. Today the law-making power is vested in our legislative bodies-it is they that define the policies of the time-and when they have spoken, it is for the courts but to construe their words and then declare and enforce the law as enacted by them.[81]

Unlike the South Dakota Supreme Court, the court in *Stone* ignored the applicable codification of common law marriage and took matters into its own hands.

The *Stone* court cited *Russo v. Sutton*[82] as its source of authority to rewrite common law, stating: "The common law changes when necessary to serve the needs of the people."[83] Yet, the court's reliance on *Russo* is largely misplaced. Recognizing that the South Carolina General Assembly already dispensed with related common law heart balm actions,[84] the court in *Russo*

76. S.D. CODIFIED LAWS § 25-1-29 (2013).

77. 15A C.J.S. *Common Law* § 3 (2012).

78. *Id.* § 16.

79. *Id.*

80. *See generally* State v. Johnson, 343 S.C. 693, 695, 541 S.E.2d 855, 857 (2001) ("When interpreting a statute, our primary role is to ascertain the intent of the legislature. . . . [W]ords should be given their plan and ordinary meaning, and we should not look for or try to impose another meaning." (first citing State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 671–72 (1993); and then citing State v. Smith, 330 S.C. 237, 240, 498 S.E.2d 648, 649–50 (Ct. App. 1998))).

81. *In re* Svendsen's Estate, 158 N.W. 411, 411 (S.D. 1916).

82. Russo v. Sutton, 310 S.C. 200, 204 422 S.E.2d 750, 753 (1992).

83. Stone v. Thompson, 428 S.C. 79, 85, 833 S.E.2d 266, 269 (2019) (citing *Russo*, 310 S.C. at 204, 422 S.E.2d at 753).

84. *See* S.C. CODE ANN. § 15-3-150 (2005).

prospectively abolished the heart balm action of alienation of affections.[85] The *Stone* court is correct in saying that it has power to eliminate a common law doctrine; however, *Russo* is distinguishable from *Stone*. Unlike the purely common law doctrine of alienation of affections, common law marriage is codified.[86] In *Russo*, it is axiomatic that while the legislature may abolish a common law cause of action, the court may not independently override a statutory codification.

Two cases more applicable to the power struggle in *Stone* are those regarding dog-bite liability in South Carolina. Prior to 1985, South Carolina common law followed the "one free bite" rule;[87] however, in 1985, the South Carolina Supreme Court in *Hossenlopp v. Cannon*[88] "rejected the 'one free bite' rule and imposed quasi-strict liability on dog owners by adopting the 'California Rule' for dog bite liability."[89] In the year following the *Hossenlopp* decision, the South Carolina General Assembly codified the California Rule[90] and "additionally imposed liability on any other persons having the dog in their 'care or keeping.'"[91] In 2009, the South Carolina Supreme Court revisited the dog-bite liability issue in *Harris v. Anderson County Sheriff's Office*.[92] Recognizing the implication of codification, the court in *Harris* observed: "This transition from the common law to the statutory setting, of course, restricts our policy-making role and concomitantly requires this court to discern legislative intent."[93] Regarding any argument that § 20-1-360 of the South Carolina Code fails to directly mention "common law marriage," neither did the statute at issue in *Harris*. Yet, the *Harris* court simply evaluated the unambiguous language of the statute to determine legislative intent, which the *Stone* court should have done, as well.[94]

When any court undertakes to evaluate legislative intent, such intent should be "ascertained by interpretation from consideration of the entire act,

85. *Russo*, 310 S.C. at 204, 422 S.E.2d at 753.

86. *See* Motsinger v. Nationwide Mut. Ins. Co., Civil Action No. 4:11-01734, 2013 WL 6179386, at *7 (D.S.C. Nov. 25, 2013) ("In South Carolina, the legality of common law marriage is codified at S.C. Code Ann. § 20-1-360 . . . .").

87. *See* Harris v. Anderson Cnty. Sheriff's Office, 381 S.C. 357, 360, 673 S.E.2d 423, 424 (2009); *see also* Hossenlopp v. Cannon, 285 S.C. 367, 372, 329 S.E.2d 438, 441 (1985).

88. *Hossenlopp*, 285 S.C. at 372, 329 S.E.2d at 441.

89. *Harris*, 381 S.C. at 361, 673 S.E.2d at 425.

90. *See* S.C. CODE ANN. § 47-3-110 (1986) (amended 2013) ("Whenever any person is bitten or otherwise attacked by a dog while the person is in a public place or is lawfully in a private place, including the property of the owner of the dog or other person having the dog in his care or keeping, the owner of the dog or other person having the dog in his care or keeping is liable for the damages suffered. . . . If a person provokes a dog into attacking him then the owner of the dog is not liable.").

91. *Harris*, 381 S.C. at 362, 673 S.E.2d at 425.

92. *See id.*

93. *Id.*

94. *Id.* at 366, 673 S.E.2d at 428.

its nature and object, and the consequences of construction one way or the other."[95] The *Stone* court interpreted § 20-1-360 of the South Carolina Code as merely directory,[96] but the South Carolina General Assembly's attempts to abolish common law marriage signals a starkly different view. Considering the high demands of legislative action in South Carolina, it is hard to imagine the legislature would exhaust ten legislative sessions over the course of an eighteen-year period to abolish a statute it perceived as directory. Moreover, considering that all legislative bills attempting to abolish common law marriage[97] have referenced § 20-1-360, this indicates the legislature recognized that the judicial doctrine of common law marriage and the statutory exception could not coexist. The fact that, even under public criticism, the legislature chose not to abolish this statute supports the notion that it is mandatory, and thus, the *Stone* court erred by deeming pertinent statutes tacit recognition.

Upon codification of a common law doctrine, the court's role shifts from being a creator of common law to an interpreter of statutory law. In *Stone*, the court gleaned guidance from the general statutory requirement that all valid marriages be manifested by a valid marriage license.[98] However, in doing so, the court essentially handpicked which provisions of the code sections applied. The court's role is to interpret statutory law, not to abrogate it. The court noted that it "can discern no more efficacious way to fulfill [predictable, just outcomes] than to require those who wish to be married in our State to comply with our statutory requirements."[99] Yet, statutory requirements conflict with the *Stone* holding because, as of now, § 20-1-360 recognizes that a marriage contract is not illegal absent a license, whereas courts require a license to find a marriage valid. By implication, when a sharp statutory mandate allows for a valid marriage regardless of licensure, the court cannot rear its power to declare unlicensed marriages void.

IV. IMPLICATIONS OF *STONE V. THOMPSON*

A. Effects of Abolishment

Notwithstanding the *Stone* court's usurpation of power, the repercussions of *Stone* are immeasurable. Although the abolishment only applies prospectively, the force of the decision will be felt for decades to come. Under

95. Skaggs v. Fyffe, 98 S.W.2d 884, 886 (Ky. 1936).

96. *See* State v. Ward, 204 S.C. 210, 210, 28 S.E.2d 785, 786 (1944) ("[S]tatutes prescribing the procurement of a license and other formalities to be observed in the solemnization of marriage . . . . have uniformly been held directory merely.").

97. *See* H.B. 3774, 114th Gen. Assemb., 1st Reg. Sess. (S.C. 2001).

98. *See* Stone v. Thompson, 428 S.C. 79, 83, 833 S.E.2d 266, 268 (2019).

99. *Id.* at 86, 833 S.E.2d at 270.

the doctrine of common law marriage, any married couple was eligible to enjoy the benefits of marriage and the protections of divorce, notwithstanding a marriage license or lack thereof.[100] Because "[v]alid marriage under state law is . . . a significant status for over a thousand provisions of federal law,"[101] the effect of *Stone* is a deprivation of myriad liberties, including alimony, distribution of assets, estate distribution, insurance benefits and spousal coverage, visitation and custody, and many others.

1. Alimony

One of the most palpable consequences of *Stone* is the unavailability of alimony for common law spouses upon dissolution of their relationship. A potential award of alimony safeguards a disadvantaged spouse in both fault and no-fault divorces,[102] yet *Stone* eliminates all common law couples for qualification by entirely denying the recognition of their marriage in the first place. Furthermore, because alimony is often granted with termination upon remarriage of the supported spouse,[103] the result of *Stone* inequitably allows a supported spouse to avoid alimony termination.

For example, assume Ed and Allie were married in 2010. After ten years of marriage, the couple obtained a divorced, and the family court ordered Ed to pay Allie $1,200 per month in alimony. One year after their divorce was finalized, Allie began dating Todd. Todd was a multimillionaire who happened to be the chief executive officer at the marketing firm where Allie

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100. *Id.* at 83, 833 S.E.2d at 268.

101. Obergefell v. Hodges, 576 U.S. 644, 670 (2015). *See also* United States v. Windsor, 570 U.S. 744, 752 (2013); Editorial, *supra* note 18. As of December 31, 2003, "a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT (2004).

102. Craig v. Craig, 365 S.C. 285, 292, 617 S.E.2d 359, 362 (2005) ("Alimony is a substitute for the support which is normally incident to the marital relationship." (citing Spence v. Spence, 260 S.C. 526, 529, 197 S.E.2d 683, 684 (1973))); Pirri v. Pirri, 369 S.C. 258, 267, 631 S.E.2d 279, 284 (Ct. App. 2006) ("The purpose of alimony is to place the supported spouse in the position he or she enjoyed during the marriage." (citing *Craig*, 365 S.C. at 292, 617 S.E.2d at 362))); Prevatte v. Prevatte, 297 S.C. 345, 352, 377 S.E.2d 114, 118 (Ct. App. 1989) (affirming an award of alimony to common law wife after she sought divorce on the grounds of common law husband's adultery).

103. 13 S.C. JUR. *Divorce* § 55 (1992) ("Periodic, rehabilitative, and reimbursement alimony are also terminable upon the remarriage of the payee spouse."). *See also* S.C. CODE ANN. § 20-3-130(B) (2014) ("Alimony and separate maintenance and support awards may be granted pendente lite and permanently . . . subject to conditions as the court considers just including, but not limited to: (1) Period alimony to be paid but terminating on the remarriage or continued cohabitation of the supported spouse . . . . (3) Rehabilitative alimony in a finite sum to be . . . terminable upon the remarriage or continued cohabitation of the supported spouse . . . . (4) Reimbursement alimony to be . . . terminable on the remarriage or continued cohabitation of the supported spouse . . . .").

worked. Allie later moved in with Todd, and they shared living expenses. Two months after living together, Allie received a call from her sister, requesting that Allie care for their ailing mother once per month to give their father a short break. Allie agreed, and she traveled to North Carolina one Friday per month, leaving Todd behind to care for the home. Eventually, Allie and Todd began introducing themselves as husband and wife at work, but because Allie knew that her alimony would terminate upon remarriage, she and Todd refused to sign a marriage license or have a formal ceremony. Meanwhile, Ed was a teacher, getting by on the bare minimum due to his income being significantly reduced by alimony payments. Prior to *Stone*, Allie and Todd's relationship would likely constitute a common law marriage, and Ed could petition for termination of alimony on the basis of Allie's remarriage. After *Stone*, however, Allie can enjoy the benefits of alimony with no strings attached because Allie and Todd's relationship does not qualify as a common law marriage.[104]

Although an obligor can seek a remedy under § 20-3-150 of the South Carolina Code—which requires the court to modify alimony if a supported spouse continuously cohabitated with a different partner for ninety days—Ed is out of luck because the cohabitation period technically restarted each time Allie left to care for her mother.[105] Justice Hearn, the author of *Stone*, has

104. *See* Jeanes v. Jeanes, 255 S.C. 161, 167–68, 177 S.E.2d 537, 540 (1970) (affirming a family court's decision to terminate alimony upon the common law marriage of the supported spouse); Rodgers v. Herron, 226 S.C. 317, 334–35, 85 S.E.2d 104, 112–13 (1954) (demonstrating that a subsequent common law marriage can terminate trust income conditioned on remarriage of the beneficiary).

105. S.C. CODE ANN. § 20-3-150 (2014) ("If the court awards [permanent alimony] . . . upon the remarriage or continued cohabitation of the supported spouse[,] the amount fixed in the decree for his or her support shall cease . . . . For purposes of this section and unless otherwise agreed to in writing by the parties, 'continued cohabitation' means the supported spouse resides with another person in a romantic relationship for a period of ninety or more consecutive days."). The South Carolina Supreme Court applies a strict interpretation of "continued cohabitation," such that even if the supported spouse spends one day away from an alleged cohabiting romantic partner, the period of cohabitation restarts. Under this interpretation, few supporting spouses have successfully proved continued cohabitation. *See, e.g.*, McKinney v. Pedery, 413 S.C. 475, 486, 776 S.E.2d 566, 572 (2015) ("During the time in question, [wife] lived at her son's house in Duncan approximately two days of every week, which means that under a literal interpretation of the statute, [wife and her romantic partner] could not have lived 'under the same roof' for ninety consecutive days."); Eason v. Eason, 384 S.C. 473, 477–81, 682 S.E.2d 804, 806–08 (2009) (affirming a family court decision denying termination of alimony upon a showing that wife was involved in a two-year adulterous relationship because although both parties admitted to living together, "they never cohabited for more than two [to] four weeks at a time"); Biggins v. Burdette, 392 S.C. 241, 245–46, 708 S.E.2d 237, 239 (Ct. App. 2011) ("[E]ven if the parties did reside together for certain periods of time, according to [romantic partner's] testimony, [wife] 'kicked him out' when she had visitors and he took all his things with him . . . . The evidence shows the parties separated to protect [wife's] reputation, not

acknowledged the practical impossibility of using this protection to terminate alimony: "Few people live under the same roof for ninety consecutive days; indeed, I would venture to say that because of their work schedule, none of the members of this court could be considered to have resided with his or her spouse for ninety consecutive days."[106] Before *Stone*, supporting spouses could circumvent this provision if the court found that their ex-spouse formed a common law marriage with another individual. However, the inequitable implication of *Stone* is such that an obligor is unable to terminate alimony payments even when the supported spouse is, for all intents and purposes, enjoying a quasi-marital relationship. As a result, a spouse like Ed is left footing the bill for his ex-wife's rendezvous with her new lover, despite having a subpar salary and a mountain of personal expenses.

2. *Distribution of Assets*

Upon dissolution of marriage, South Carolina courts apply fifteen statutory factors[107] to determine the superior method of equitably distributing marital property in a particular case.[108] Equitable distribution is a tremendous benefit of marriage because it utilizes equity principles to ensure each spouse receives fair compensation for their marital efforts and contributions.[109] Thus, the contributions of an economically successful spouse will not always impose a financial burden on an unemployed spouse. Rather, the court considers equitable factors when distributing funds, including whether an unemployed spouse maintained the home and took care of children.[110]

In this regard, the abolishment of common law marriage disadvantages couples that would otherwise qualify as common law married. Now, instead

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to circumvent the statute."); Fiddie v. Fiddie, 384 S.C. 120, 126, 681 S.E.2d 42, 45 (Ct. App. 2009) (affirming a family court decision not to terminate alimony because "testimony from [w]ife's sister and friend corroborated [w]ife's testimony that she stayed with them for several days each month . . . . [not] in an attempt to circumvent the continued cohabitation statute . . . ."); Feldman v. Feldman, 380 S.C. 538, 542–45, 670 S.E.2d 669, 671–72 (Ct. App. 2008) (demonstrating the overwhelming difficulty of proving ninety days of consecutive cohabitation, even with private investigator surveillance); Semken v. Semken, 379 S.C. 71, 77–78, 664 S.E.2d 493, 497 (Ct. App. 2008) (reversing termination of alimony because although wife and her romantic partner were romantically involved, romantic partner had two homes during the period of their relationship, thus he did not spend ninety consecutive nights with wife).

106. *McKinney*, 413 S.C. at 491, 776 S.E.2d at 574 (Hearn, J., concurring).

107. S.C. CODE ANN. § 20-3-620 (2014).

108. *See id.* § 20-3-610 (2014) ("During the marriage a spouse shall acquire . . . a vested special equity and ownership right in the marital property . . . which equity and ownership right are subject to apportionment between the spouses by the family courts of this State at the time marital litigation is filed or commenced as provided in Section 20-3-620.").

109. *See* Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R.4th 481, 484 (1985).

110. *See id.*

of equitably distributing marital property and reimbursing marital contributions, cohabitants must divide their property under traditional rules of property law.[111] Without a remedy like equitable distribution, there is no consideration of the couple's joint effort.[112] Thus, a wife who may have contributed substantially more to the enhancement of a retirement account in her husband's name, for example, may be unable to recover. Whereas a family court would consider this contribution in the context of marriage and distribute assets accordingly, an unmarried couple must depend on a circuit court's title-based approach, likely resulting in their contributions being viewed as a gift.[113]

The failure to recognize transmutation among an otherwise common law couple is another consequence of abolishing common law marriage.[114] Under the doctrine of transmutation, separate property can be converted, or transmuted, into marital property and thus subject to equitable distribution if "the property becomes so commingled as to be untraceable; [the property] is utilized by the parties in support of the marriage; or [the property] is titled jointly or otherwise utilized in such manner as to evidence an intent by the parties to make it marital property."[115] A common example of transmuted property is a home that one partner owned prior to the relationship but utilized as a marital home during the marriage.[116] Because the owner utilized the home in a manner indicating intent to become marital property, the home is transmuted and, therefore, subject to equitable distribution.[117] Hypothetically, the unavailability of common law marriage may result in thousands of dollars in lost equity, and ignoring the doctrine of transmutation in such contexts

111. Nat'l Legal Research Grp., Inc., *Cohabitation—Partition*, 20 EQUITABLE DISTRIBUTION J., no. 10, 2003, at 117, 117 ("When the court divides property between unmarried persons, it does so under the law of partition, not the law of equitable distribution."). *See also* Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977) (couple clearly met the requirements of a common law marriage yet had to divide property by partition after dissolution of the relationship because their jurisdiction no longer recognized common law marriage).

112. *See* Doris Jonas Freed, *Family Law in the Fifty States: An Overview*, 21 FAM. L.Q. 417, 456 (1988).

113. *See id.*

114. Pirri v. Pirri, 369 S.C. 258, 286, 631 S.E.2d 279, 286 (Ct. App. 2006) ("Nonmarital property may be transmuted into marital property. In determining whether property has been transmuted, courts must consider whether the property: (1) 'becomes so commingled with marital property as to be untraceable;' (2) is titled jointly; or (3) 'is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property.'" (quoting Jenkins v. Jenkins, 345 S.C. 88, 89, 545 S.E.2d 531, 537 (Ct. App. 2001))).

115. Hussey v. Hussey, 280 S.C. 418, 423, 312 S.E.2d 267, 270–71 (Ct. App. 1984).

116. Drayton v. Drayton, No. S.CT.CIV.2015-0068, 2016 WL 4543192, at *7 (V.I. Aug. 30, 2016).

117. *Id.*

inevitably results in a prejudicial distribution of separate property according only to title only.

3. *Estate Distribution*

In South Carolina, the law provides a default distribution in formal marriage such that, if a decedent dies intestate, "[t]he intestate share of the surviving spouse is: (1) if there is no surviving issue of the decedent, the entire intestate estate; (2) if there are surviving issue, one-half of the intestate estate."[118] As a result of *Stone*, an otherwise common law spouse surrenders his or her default right to a minimum 50% share in a spousal estate. To ensure that a living partner benefits from the estate of a decedent, an otherwise-qualifying couple must make certain arrangements that are not required for formally married couples.[119] Considering that a 2019 study of 1,003 adults revealed that only 57% of them had estate planning documents, the removal of a legal default protection for such a large subset of individuals is drastic.[120]

To ensure a right in their partner's estate, an otherwise common law couple must, first and foremost, establish a will or revocable living trust, explicitly designating one another as beneficiary or trustee.[121] This simply guarantees distribution according to the decedent's desires. To account for possible illness or other incapacitations, a couple must then complete healthcare directives or living wills, along with a durable financial power of attorney.[122] Otherwise, a partner may not have the right to make healthcare decisions or the adequate funding to provide care for his or her partner.[123] These additional requirements do not resemble each and every precaution that couples should take to safeguard their rights in the event of death or incapacity, but they do provide a comprehensive overview of the complexities that confront otherwise common law married couples.

4. *Insurance Benefits and Spousal Coverage*

Most state, federal, and private insurance policies allow policyholders to seek coverage for their spouses and dependents, and these policies often

118. S.C. CODE ANN. § 62-2-102 (2009).

119. Valerie Keene, *Estate Planning for Common Law Marriages*, NOLO https://www.nolo.com/legal-encyclopedia/estate-planning-for-common-law-marriages.html [https://perma.cc/XD8S-7EVB].

120. *More Than Half of American Adults Don't Have a Will, 2017 Survey Shows*, CARING.COM, https://www.caring.com/caregivers/estate-planning/wills-survey/2017-survey/ [https://perma.cc/MMR6-XBXH].

121. Keene, *supra* note 119.

122. *Id.*

123. *Id.*

define *spouse* according to state law.[124] Thus, married couples enjoy virtually as many insurance benefits as they can afford. After *Stone*, however, the definition of a spouse encompasses only those South Carolina citizens with valid marriage licenses.[125] Accordingly, couples that would otherwise qualify for spousal coverage on health insurance,[126] life insurance,[127] and automobile insurance policies[128] may be left empty-handed. A simple solution to this inequity seems to be for a couple to get married. If an insured partner passes away or becomes ill, however, the mere absence of a certificate will prevent the other partner from claiming spousal coverage to fund immediate needs.

Two other implications of *Stone* arise in the employment law context. First, under the South Carolina Workers' Compensation Act, a spouse is eligible for dependent survivor benefits under § 42-1-175 of the South Carolina Code—which defines a surviving spouse as "the decedent's wife or husband living with or dependent for support upon the decedent at the time of the decedent's death or living apart from the decedent for justifiable cause or by reason of desertion by the decedent at such time."[129] This is another example of a remarkable benefit of marriage, especially for those who do not have life insurance or other existing protections to safeguard their finances in the case of unexpected death. Unfortunately for those affected by *Stone*, because a common law spouse is no longer considered the wife or husband of a decedent, there are absolutely no survivor benefits available to such a dependent under South Carolina's current workers' compensation regime.[130] Inevitably, this shift in definition will leave the surviving partner with even more of a financial burden after the death of a loved one.

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124. *See* JOSEPH S. ADAMS & TODD A. SOLOMON, DOMESTIC PARTNER BENEFITS: AN EMPLOYERS GUIDE ch. 3 (7th ed. 2011), Westlaw 24954707.

125. *See* 428 S.C. 79, 86, 833 S.E.2d 266, 269–70 (2019).

126. *In re* Estate of Stodola, 519 N.W.2d 97, 99 (Iowa Ct. App. 1994) (demonstrating the ability of a health insurance policyholder to seek spousal coverage for his common law wife); Poland Twp. Bd. of Tr.s v. Swesey, No. 02 CA 185, 2003 WL 22946148, at *1, *8 (Ohio Ct. App. Dec. 12, 2003) (affirming a jury's finding of common law marriage, thus allowing the couple to be eligible for family coverage as opposed to single coverage).

127. Moore v. Metro. Life Ins. Co., 949 F. Supp. 2d 1201, 1210 (M.D. Ala. 2013) (finding common law wife was entitled to the benefits of a dependent-life-insurance policy on common law husband after he died of lung cancer); Baker v. Mays & Mays, 199 S.W.2d 279, 284–85 (Tex. Civ. App. 1946) (holding that common law wife had an insurable interest in the life of common law husband, thus entitling her to life insurance benefits after his death).

128. Bell v. Progressive Direct Ins. Co., 407 S.C. 565, 582–83, 757 S.E.2d 399, 408 (2014) (demonstrating the possibility of spousal coverage for a common law couple whose automobile insurance policy covers resident relatives); Whyte v. Blair, 885 P.2d 791, 795 (Utah 1994) (showing the possibility of a common law spouse's coverage as a family member of the covered spouse).

129. S.C. CODE ANN. § 42-1-175 (2015).

130. *See id.*

Second, and perhaps the most extreme result of *Stone*, is the abolishment's effect on Family and Medical Leave Act coverage. The Act defines "husband or wife" as follows:

> [T]he other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into . . . . This definition includes an individual in a same-sex or common law marriage that either: (1) Was entered into in a State that recognizes such marriages; or (2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.[131]

An implication of *Stone* is that, after the date of the opinion, a couple must register a valid marriage license with the state in order to seek covered medical leave to care for a spouse. Hypothetically, this means that a couple in the year 2060 may have been together for forty years, yet neither can take leave to care for their terminally ill partner. This is an unfortunate outcome for all involved, particularly for those who do not realize their need for coverage until their partner is already ill or unexpectedly incompetent, or those who, for possible religious or personal reasons, are not ready to enter into a formal marriage.

5. Visitation and Custody

When a child is born to married parents, the Supreme Court of South Carolina has declared "a common law presumption that [the child] is a child of the marriage."[132] Unless a husband submits evidence rebutting this presumption,[133] his presumed paternity will prevail. In the case of marital separation, both parents have full custody rights to their child until a family court orders otherwise.[134] Upon petition for custody or upon divorce

131. 29 C.F.R. § 825.102 (2018).

132. Fisher v. Tucker, 388 S.C. 388, 392, 697 S.E.2d 548, 550 (2010); *see also* Chandler v. Merrell, 291 S.C. 224, 225–26, 353 S.E.2d 133, 134 (1987) ("The presumption of legitimacy is one of the strongest known to law. Every child born in wedlock is presumed to be legitimate." (citations omitted)).

133. The admissibility of evidence in a paternity hearing is governed by S.C. CODE ANN. § 63-17-60 (2010). Examples of admissible evidence include genetic test results, refusal of a party to submit to genetic testing, and testimony of a husband and wife. *Id.* § 63-17-60(1)–(2), (8). Specifically, evidence of test results with a paternity probability of 95% or higher and evidence of a birth certificate containing the mother and the petitioner's signatures create a rebuttable presumption. *Id.* § 63-17-60(3), (5).

134. *See* Gregory S. Forman, *How Is Child Custody Determined?*, GREGORY S. FORMAN, P.C. (2009), https://www.gregoryforman.com/faqs/how-is-child-custody-determined/#:~:text=South%20Carolina%20law%20requires%20the,awarded%20to%20the%20primary%20caretak

proceedings, § 63-5-30 of the South Carolina Code recognizes that currently or previously married parents have "equal power, rights, and duties, and neither parent has any right paramount to the right of the other concerning the custody of [minor children.]"[135] Beginning on equal footing, a family court evaluates the best interests of the child in order to determine whether custody or visitation is appropriate.[136] Absent a wife's showing that her husband is an unfit father, the court will typically allow the father to have unsupervised visitation at a minimum.[137]

In terms of visitation and custody, the immediate ramification of *Stone* will affect a specific type of father; however, this effect is incredibly harsh when comparing the rights of a married father to those of an unmarried father. For example, consider a father, Chris, who began a relationship with his girlfriend, Samantha, in the winter of 2019. Throughout their five-year relationship, Chris and Samantha filed joint tax returns, bought a home together, and introduced one another as husband and wife. Eventually, Samantha became pregnant, and the couple was elated. Samantha had a son named Elijah, but while in the hospital, Samantha discovered Chris was cheating on her. Thereafter, Samantha refused to acknowledge Chris on Elijah's birth certificate, and in fact, she requested that hospital security keep Chris away from her room. Prior to *Stone*, Chris and Samantha would likely constitute a common law married couple, Chris would be Elijah's presumed biological father, and Chris would inevitably be entitled to custody or visitation. However, because Chris and Samantha entered into a relationship after the July 24, 2019 opinion, Chris is deprived of these rights. Instead, he has the rights of an unmarried father, which, unfortunately for him, are unfavorable in South Carolina.

When a South Carolina child, like Elijah, is born out of wedlock, § 63-17-20(B) of the South Carolina Code presumes custody with the child's mother.[138] In order to gain any right of custody or visitation, an unmarried

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er [https://perma.cc/7Y8J-HY5C] (listing a non-exhaustive list of factors courts should consider in custody cases per S.C. CODE ANN. § 63-15-240(B)).

135. S.C. CODE ANN. § 63-5-30 (2010); *see also* Kisling v. Allison, 343 S.C. 674, 678, 541 S.E.2d 273, 275 (Ct. App. 2001) ("In South Carolina, in custody matters, the father and mother are in parity as to entitlement of the child. When analyzing the right to custody as between a father and mother, equanimity is mandated. We place our approbation upon the rule that in South Carolina, there is no preference given to the father or mother in regard to custody of the child. The parents stand in perfect equipoise as the custody analysis begins.").

136. *See* S.C. CODE ANN. § 63-15-240(B) (2010 & Supp. 2019) (listing seventeen statutory factors that a family court may consider in determining custody); Shirley v. Shirley, 342 S.C. 324, 330–31, 536 S.E.2d 427, 430 (Ct. App. 2000).

137. *See* Forman, *supra* note 134.

138. *See* S.C. CODE ANN. § 63-17-20(B) (2010) ("Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished

father must overcome several hurdles. First, the father must establish his paternity.[139] As the South Carolina Center for Fathers and Families notes, if the father does not establish paternity, "[t]he father has no legal say in decisions such as education, medical treatment[,] or religion . . . does not have the right to be notified if his child is being adopted[.]"[140] Although it would seem sufficient, acknowledgement of fatherhood on a child's birth certificate does not legally establish paternity, and the father's requirements vary depending on the compliance of his child's mother.[141]

If a child's mother consents to the father establishing paternity, the mother and father can sign a Paternity Acknowledgement Affidavit either in the hospital or at a health department in the county of their child's birth.[142] However, if a child's mother opposes the father establishing paternity, she has incredible power over the situation. In such a situation, the father must first complete DSS Form 27103.[143] Upon completion, the father must undergo a test to match his DNA with that of the child,[144] and this test must positively identify the father as the child's biological match in order to legally establish paternity.[145]

If a father fails to take the appropriate steps to establish paternity, his child's mother will have incredible power over his rights to the child. For example, if the father has not filed a claim of paternity with the Responsible Father Registry and is not actively present in the child's life, a mother may have the unilateral ability to terminate the father's rights or place the child for adoption without notice to the father.[146] Although this example is rather

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her rights to the child. If paternity has been acknowledged or adjudicated, the father may petition the court for rights of visitation or custody in a proceeding before the court apart from an action to establish paternity."); *see also Establishing Paternity*, S.C. CTR. FOR FATHERS & FAMS., https://www.scfathersandfamilies.com/fatherhood-issues/establishing-paternity/ [https://perma.cc/M59K-BS45].

139. *Establishing Paternity*, *supra* note 138.

140. *Id.*

141. *What Are My Rights as an Unwed Parent?*, CATE & BROUGH LAW FIRM P.A., https://www.thecatelawfirm.com/what-are-my-rights-as-an-unwed-parent/ [https://perma.cc/7WHW-ZW4Q] ("Putting a father's name on a birth certificate is not the same thing as establishing paternity, so a mother still has full rights even in this situation.").

142. *Legal Paternity Actions*, S.C. CTR. FOR FATHERS & FAMS., https://www.scfathersandfamilies.com/fatherhood-issues/establishing-paternity/legal-paternity-actions/ [https://perma.cc/PMM7-7R6M]. The Department of Social Services charges a $15 fee for completion of this form. *Id.*

143. *Id.* The Department of Social Services charges a $25 fee for completion of this form. *Id.*

144. *Id.* If the test indicates a match, the test fee is waived. *Id.* If the test does not indicate a match, the individual is charged a testing fee. *Id.*

145. *See id.*

146. *Responsible Father Registry*, S.C. CTR. FOR FATHERS & FAMS., https://www.scfathersandfamilies.com/fatherhood-issues/establishing-paternity/responsible-father-registry/ [https://perma.cc/78F6-LQGX].

drastic, it goes to show the incredible disparity in married fathers' rights as compared to unmarried fathers' rights. Whereas § 63-9-310(A)(2) of the South Carolina Code requires consent from both married parents before someone can adopt their child (regardless of the father's involvement in his child's life), the comparable statute for unmarried fathers requires a father's consent only when he can overcome substantial burdens of proof.[147]

Even after a father establishes legal paternity, however, he must overcome additional hurdles to ensure visitation or custody.[148] Assuming not every relationship ends on good terms, vindictive mothers may leverage visitation or custody, making it increasingly difficult for unwed fathers to obtain these rights. According to Robert Franklin, attorney and journalist for National Parents Organization, this creates a scenario where fathers "are still under the thumb of their child's mother.[149] Further, if an unmarried father seeking custody cannot access his child, he faces a disadvantage under the South Carolina Supreme Court's "assumption that custody will be awarded to the primary caretaker."[150] Thus, an unwed father begins the process at the short end of the stick, so to speak. First, he must overcome excessive impediments to prove his paternity, and then, he must formally petition for visitation and custody, if applicable.

For both married and unmarried fathers, a custody case presents a plethora of challenges. However, because an unmarried father does not have default rights under South Carolina law like married fathers do, he must successfully prove further administrative burdens, risking even more litigation to ensure participation in his child's life.[151] Unfortunately, the abolishment of common law marriage may isolate unmarried fathers from their children until a court orders visitation or custody. *Stone* undoubtedly places an undue burden on fathers in otherwise-qualifying relationships by requiring not only the establishment of legal paternity but also an uphill battle for visitation or custody. Unless and until a father establishes legal paternity, his child's

147. *See* S.C. CODE ANN. § 63-9-310(4)–(5) (2010). If a child is over six months at the time of placement, an unmarried father's consent is required only if he "has maintained substantial and continuous or repeated contact with the child" through paying a reasonable amount of child support and either visiting the child monthly or regularly communicating with the child. § 63-9-310(4). If a child is under six months at the time of placement, an unmarried father's consent is required only if he paid a reasonable amount of child support or continuously lived with the mother six months immediately preceding placement and held himself out to be the father of the child during this period. § 63-9-310(5).

148. Robert Franklin, *South Carolina: Still Keeping Single Dads Out Of Children's Lives*, NAT'L PARENTS ORG., https://nationalparentsorganization.org/blog/22044-south-carolina-still-keeping-single-dads-out-of-children-s-lives [https://perma.cc/VB5N-LJNK].

149. *Id.*

150. Patel v. Patel, 359 S.C. 515, 527, 599 S.E.2d 114, 120 (2004).

151. *See* Forman, *supra* note 134.

mother controls the scope of his rights, and he is much more vulnerable than a married father with assumed rights.[152]

B. The State of Existing Cohabitants' Rights

Existing law dictates that "a man and woman cohabiting . . . do not acquire, by reason of such cohabitation alone, any rights in property accumulated in the name of the other, regardless of their good faith."[153] Compared to the benefits of a marital relationship, couples who would have constituted common law spouses prior to *Stone* now have drastically different rights upon dissolution. As a result of *Stone*, cohabitating partners that fail to complete a valid marriage license cannot seek equitable distribution through family court. Instead, cohabiting partners must seek remedies through contract or property law, whereby circuit courts primarily concentrate on pooling and contribution to establish cohabitant rights.[154]

The most litigated aspect of cohabitant rights to personal property is pooling, a concept similar to the marital doctrine of transmutation.[155] To determine whether cohabitants pooled their income, assets, or debts, the court evaluates the following:

> For what length of time have the parties pooled the property or funds? What is the form in which the pooled funds or assets are held (e.g., title of bank account, name or names on real estate title, names on credit cards, person who is listed on bills)? What was their stated intent in pooling (e.g., support an ill partner, support a stay-at-home person, use of a common bank account, creating joint or co-ownership or property, giving of gift to a partner, etc.)? Is there a sizable disparity in the property or amounts pooled (e.g., one person contributes significantly more, or less, than the partner)?[156]

In addition to pooling, the court may evaluate contribution.[157] Unlike pooling, contribution is a concept that measures the interests parties have in acquired property based on the efforts each party made in the form of "labor,

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152. Franklin, *supra* note 148 ("Unmarried fathers have no rights to their children in South Carolina and, even if they prove paternity, are still under the thumb of their child's mother. She must consent to his visitation; if she doesn't, the onus—legal and financial—is on him to prove his worth. Needless to say, no such requirement is placed on the mother.").

153. George L. Blum, Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage*, 69 A.L.R.5th 219 (1999).

154. 95 AM. JUR. PROOF OF FACTS 3D *Cohabitants and Domestic Partners* § 5 (2007).

155. *Id.*

156. *Id.*

157. *Id.*

capital, or the like."[158] Thus, contribution resembles more of an effort-based investment, whereas pooling is exclusively monetary.

Upon dissolution of a cohabitant relationship, another consideration is interest in real property. If both partners hold title to real estate through a joint tenancy and cannot agree to partition, one of the partners must sue for partition in order to either "have the property sold and the proceeds divided in proportionate shares among the owners" or divide the property such that "each owner receives a physical portion of the property equal to his percentage of ownership."[159] In the case of a joint tenancy, failure to sue for partition before the death of either partner will result in survivorship rights to the opposing partner.[160] If the parties own real estate through a tenancy in common and cannot agree to a partition, however, one of the partners must sue for partition upon which the court awards ownership rights according to a party's proportional ownership of the property.[161] If the parties neither hold joint title nor have an existing lease agreement for the property, a non-owner partner is likely a month-to-month tenant.[162] To evict a partner in a month-to-month tenancy, the owner partner must simply give thirty-days' written notice.[163]

V. AVAILABLE DOCTRINAL EXCEPTIONS

It is apparent the abolishment of common law marriage adversely affects a large subset of individuals either who wish to enjoy the benefits of marriage without the formality of traditional marriage requirements or who cannot enjoy such benefits because of some tragedy depriving them of the ability to marry. Perhaps most disadvantaged by the abolishment, however, are individuals who believe themselves to be parties to a formal marriage but nevertheless have an impediment rendering their marriage null and void. After *Stone*, these couples no longer have a default alternative to guarantee legal recognition of their marriage. While the *Stone* court unmistakably established its distaste for common law marriage as an independent doctrine of marital

158. *Id.*

159. W.T. Geddings, Jr., *Partition Actions in South Carolina*, 27 S.C. LAW., Mar. 2016, at 18, 20. *See generally* S.C. CODE ANN. § 15-61-10(A) (2005 & Supp. 2019) ("All joint tenants and tenants in common who hold, jointly or in common, for a term of life or years or of whom one has an estate for a term of life or years with the other that has an estate of inheritance or freehold in any lands, tenements or hereditaments shall be compellable to make severance and partition of all such lands, tenements, and hereditaments.").

160. *See* Paul W. Dillingham & Claire T. Manning, *To Fee or Not to Fee*, 18 S.C. LAW., Mar. 2007, at 37, 39–48.

161. Geddings, *supra* note 159, at 20.

162. S.C. CODE ANN. § 27-35-30 (2007).

163. *Id.* § 27-35-120.

benefits,[164] it did not expressly contemplate the effects of its decision on couples with a good faith belief in the validity of their marriage. The South Carolina Supreme Court will inevitably encounter future litigation involving such issues, and as a result, fairness and equity demand an exception in these cases.

A. The Good Faith Exception

In 2015, the South Carolina Court of Appeals in *Thomas v. 5 Star Transportation* explicitly declared a third type of marriage, separate from formal and common law marriage, known as a marriage formed through the good faith exception.[165] Under *Thomas*, the court held:

> [I]f a man and woman enter into a contract of marriage believing in good faith that they are capable of entering into the relation notwithstanding a former marriage, when, in fact, the marriage is still of force, and after the removal of the obstacle of the former marriage the parties continue the relation and hold themselves out as man and wife, such action constitutes them man and wife from the date of the removal of the obstacle.[166]

South Carolina is the only state to recognize this exception, and unlike state precedent regarding both formal and common law marriage, the good faith exception is severely underdeveloped. The exception has applied in merely four cases—*Davis v. Whitlock* in 1911 and *Bannister v. Bannister* in 1929 (both South Carolina Supreme Court cases), and *Weathers v. Bolt* in 1987 and *Thomas v. 5 Star Transportation* in 2015 (both South Carolina Court

164. *See* Stone v. Thompson, 428 S.C. 79, 86, 833 S.E.2d 266, 270 (2019) ("Our public policy is to promote predictable, just outcomes for all parties involved in [common law marriage] disputes, as well as to emphasize the sanctity of the marital union. We can discern no more efficacious way to fulfill these interests than to require those who wish to be married in our State to comply with our statutory requirements. Our quest to see inside the minds of litigants asserting different motivations and levels of knowledge at varying times must yield to the most reliable measurement of marital intent: a valid marriage certificate.").

165. *See* Thomas v. 5 Star Transp., 412 S.C. 1, 16–18, 770 S.E.2d 183, 191–92 (Ct. App. 2015).

166. *Id.* at 16, 77 S.E.2d at 191 (quoting Davis v. Whitlock, 90 S.C. 233, 246, 73 S.E. 171, 175 (1911)).

of Appeals cases).[167] Of these cases, *Davis* and *Thomas* were the only cases to find a valid marriage under the good faith exception.[168]

In *Davis*, the defendant's first husband abandoned her in 1868, and she married the plaintiff in 1887.[169] At the time of her marriage to the plaintiff, the defendant admitted "she did not know whether [her first husband] was dead or alive, and that she made no inquiry about it, and that she did not tell [the] plaintiff of her prior marriages."[170] In 1901, the defendant learned that her first husband died in 1895, seven years after her marriage to the plaintiff.[171] Despite this news, the defendant continued her relationship with the plaintiff until their separation in 1907.[172] The *Davis* court held that the parties were legally married as of 1895 because of the good faith exception.[173]

Although *Davis* makes no direct mention of common law marriage, an initial decision by the trial court found the plaintiff could not invalidate his marriage with the defendant because the couple "lived together as man and wife and recognized each other as such for more than 10 years after the death of [the plaintiff's first husband], which removed the only impediment to a valid marriage . . . ."[174] Based upon these findings, the *Davis* court held there was "sufficient [evidence] to establish a common-law marriage."[175] Considering the context of the *Davis* decision, it seems that the good faith exception is a remedy completely dependent on the recognition of common law marriage. *Thomas*, however, undermines this conclusion by finding a marriage through the good faith exception and expressly declining to recognize a common law marriage.[176]

The *Davis* court cited five cases in support of the good faith exception.[177] Upon further evaluation, three of those cases used the good faith exception to find a common law marriage.[178] Another one of those cases did not expressly

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167. *Davis*, 90 S.C. at 246, 73 S.E. at 171; Bannister v. Bannister, 150 S.C. 411, 414, 148 S.E. 228, 229 (1929); Weathers v. Bolt, 293 S.C. 486, 489, 361 S.E.2d 773, 774 (Ct. App. 1987); *Thomas*, 412 S.C. at 1, 770 S.E.2d at 183.

168. *Davis*, 90 S.C. at 248–49, 73 S.E. at 176; *Thomas*, 412 S.C. at 17–18, 770 S.E.2d at 192.

169. *Davis*, 90 S.C. at 243, 73 S.E. at 174.

170. *Id.* at 235–36, 73 S.E. at 172.

171. *Id.* at 235, 73 S.E. at 172.

172. *Id.* at 235, 73 S.E. at 171.

173. *Id.* at 248–49, 73 S.E. at 176.

174. *Id.* at 236, 73 S.E. at 172.

175. *Id.*

176. *Thomas*, 412 S.C. at 18, 770 S.E.2d at 192 ("Although the Appellate Panel erred in determining [Wife] was [Husband's] common law or putative spouse, we affirm that [Wife] was [Husband's] surviving spouse because they entered into marriage with a good faith belief that they could marry and continued to act as husband and wife once the impediment was removed.").

177. *Davis*, 90 S.C. at 246, 73 S.E. at 175 (citations omitted).

178. *See* Adger v. Ackerman, 115 F. 124, 133 (8th Cir. 1902); Land v. Land, 68 N.E. 1109, 1112 (Ill. 1903); Fenton v. Reed, 4 Johns. 52, 53–54 (N.Y. 1809).

state a finding of common law marriage; rather, it cited other cases indicating the basis of its decision was the common law marriage doctrine.[179] In the only remaining cited case, *Chamberlain v. Chamberlain*, the court applied the good faith exception as a remedy exclusive of common law marriage,[180] *Chamberlain* did not identify its doctrine with terms such as "good faith" or "exception," and the opinion is extremely short with not much substantive value. The closest the *Chamberlain* court comes to announcing a rule is, "In connection with the intent of both parties as admitted by them, we have evidence to show that they manifested that intent to others after the divorce in such a way as to fully establish the legality of their relationship."[181] Thus, despite its reliance on precedent that seemingly equates marriage via good faith exception with a common law marriage, *Thomas* is the only prominent case declaring a marriage formed by the good faith exception outside of the context of common law marriage.[182]

Assuming the *Thomas* approach is correct such that common law marriage and the good faith exception are mutually exclusive, *Thomas*' rule is still applicable in South Carolina, notwithstanding *Stone*. There are notable concerns with the good faith exception, however. First, prior cases have been limited to those where the impediment at issue is bigamy.[183] This leaves open the possibility that a court can refuse to apply the good faith exception in cases of procedural issues, for example. Even if equity seems to demand a remedy for couples with technical errors on marriage licenses, invalid authorization of marriage licenses, and insufficient satisfaction of the waiting period, the *Thomas* rule, if applied verbatim, would not protect such couples. To adequately apply the good faith exception in these cases, the South Carolina Supreme Court must broaden the doctrine to apply in cases of all impediments, including those of a procedural nature.

Moreover, the court should not require removal of the impediment to ratify an otherwise void marriage because, in cases of procedural defect, the impediment often cannot be removed. For instance, when a party lacking the requisite statutory authority, such as a Buddhist priest, attempts to validate a

179. Eaton v. Eaton, 92 N.W. 995, 998 (Neb. 1902) (first citing Blanchard v. Lambert, 43 Iowa 228, 231 (Iowa 1876)); then citing Univ. of Mich. v. McGuckin, 89 N.W. 778, 779 (Neb. 1902); and then citing *Fenton*, 4 Johns. at 52).

180. Chamberlain v. Chamberlain, 62 A. 680, 681 (N.J. 1905) ("This evidence was a manifestation of an intent to live together as husband and wife, and with the intention and the actual so living an actual marriage is established.").

181. *Id.* at 680–81.

182. Thomas v. 5 Star Transp., 412 S.C. 1, 17–18, 770 S.E.2d 183, 192 (Ct. App. 2015).

183. *See* Davis v. Whitlock, 90 S.C. 233, 233, 73 S.E. 171, 171 (1911); *Thomas*, 412 S.C. at 1, 770 S.E.2d at 183; Weathers v. Bolt, 293 S.C. 486, 486, 361 S.E.2d 773, 773 (Ct. App. 1987).

couple's marriage,[184] yet the couple does not realize this invalidity, it is unlikely the couple will discover the impediment until a divorce or some other tragedy. Once again, applying the rule verbatim in this instance would not protect such individuals because, by its very nature, a marriage formed by the good faith exception requires removal of a marital obstacle and continued cohabitation thereafter. Because couples generally will not discover procedural impediments until it is too late, a more comprehensive and inclusive rule is needed whereby good faith belief in the validity of a marriage—despite the presence of an impediment—can ratify the marriage upon continuous marital cohabitation.

Another area in which South Carolina case law requires further development involves the definitional standard of good faith. Assuming South Carolina will apply the definition of good faith that other states have used,[185] the courts will encounter a directional challenge of whether the analysis of good faith encompasses purely subjective considerations or both objective and subjective considerations.[186] A purely subjective approach determines whether the proponent of the marriage indeed had a belief in the validity of the marriage, considering the specific facts of the case.[187] On the contrary, an objective-subjective approach considers whether a reasonable person in the proponent's shoes would believe a valid marriage existed.[188] When considering the approaches for determining good faith, a purely subjective approach not only would be difficult for an opposing spouse to disprove but also would result in a larger volume of marriages due to one-sided claims of

184. *See* S.C. CODE ANN. § 20-1-20 (2014) ("Only ministers of the Gospel, Jewish rabbis, officers authorized to administer oaths in this State, and the chief or spiritual leaders of a Native American Indian entity recognized by the South Carolina Commission for Minority Affairs . . . are authorized to administer a marriage ceremony in this State.").

185. *See infra* note 194 and accompanying text.

186. *See infra* note 195 and accompanying text; *infra* note 196 and accompanying text.

187. Ceja v. Rudolph & Sletten, Inc., 302 P.3d 211, 213 (Cal. 2013) ("We conclude [the putative spouse statute] contemplates a subjective standard that focuses on the alleged putative spouse's state of mind to determine whether he or she maintained a genuine and honest belief in the validity of the marriage. Good faith must be judged on a case-by-case basis in light of all the relevant facts, . . . including any objective evidence of the marriage's invalidity. Under this standard, the reasonableness of the claimed belief is a factor properly considered along with all other circumstances in assessing the genuineness of that belief. The good faith inquiry, however, does not call for application of a reasonable person test, and a belief in the validity of a marriage need not be objectively reasonable."); Xiong v. Xiong, 800 N.W.2d 187, 191 (Minn. Ct. App. 2011) ("We reject [an argument that good faith is tested by an objective standard] because in Minnesota, 'good faith' is judged subjectively, while 'reasonable belief' is judged objectively." (quoting Bahr v. Capella Univ., 778 N.W.2d 76, 82 (Minn. 2010))).

188. *In re* Marriage of Vryonis, 248 Cal. Rptr. 807, 812 (Cal. Ct. App. 1988) ("While a trial court may be tempted to base a finding of putative spousal status merely on the subjective good faith in a valid marriage held by a credible and sympathetic party, more is required. 'Good faith belief' is a legal term of art, and in both the civil and criminal law a determination of good faith is tested by an objective standard."), *overruled by Ceja*, 302 P. 3d at 221 n.12.

marriage validity. To ensure that such marriages are obtained in only the most equitable circumstances, the objective-subjective approach is better suited for South Carolina. Under this approach, the court can consider the totality of the circumstances, including the proponent's knowledge, intelligence, education, and age while also remaining grounded in the standard of a reasonable person. This ensures a fair consideration of the proponent's belief while also balancing societal perceptions of marriage validity. Regardless of any decision in this capacity, it is undeniable the good faith exception will require supplementary development to be a fully functioning, autonomous doctrine.

B. Putative Spouse Doctrine

Another potential solution for equity in the case of procedural defect is the putative spouse doctrine. According to the Uniform Marriage and Divorce Act, a putative spouse is "[a]ny person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person."[189] To qualify for protection under the putative spouse doctrine, putative spouses cannot have any awareness of the invalid status of their marriage.[190] Once an individual qualifies as a putative spouse, the doctrine allows the party to enjoy the benefits of a valid marriage despite effective invalidity.[191] Upon discovery of the invalid nature of the marriage, however, the protection of the putative spouse doctrine ceases to exist, and a couple must comply with the statutory requirements of marriage to enjoy marital benefits thereafter.[192]

There are two general elements required for putative spouse doctrine to apply: "(1) a proper ceremony [must have been] performed, and (2) one or both parties [must have had] a good-faith belief that there was no impediment

189. UNIF. MARRIAGE & DIVORCE ACT § 209 (1973).

190. *Id.*

191. Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 7 (1985). The precise benefits of a putative marriage vary depending on the state. Uniformly, putative spouse doctrine applies to division of property. *See, e.g.*, Union Bank & Trust Co. v. Gordon, 254 P.2d 644, 649 (Cal. Dist. Ct. App. 1953) ("[O]n dissolution of a putative marriage[,] the property which the *de facto* spouses have acquired as a result of their joint efforts is to be treated as though it was the accumulation of a valid marriage."). However, application of the doctrine to spousal support is more ambiguous. Some states, like Nevada and California, do not apply the doctrine to awards of alimony unless fraud is involved. Sanguinetti v. Sanguinetti, 69 P.2d 845, 847 (Cal. 1937) (citations omitted); Williams v. Williams, 97 P.3d 1124, 1126 (Nev. 2004). On the contrary, other states, including Colorado, Illinois, Minnesota, and Montana, allow a putative spouse to receive alimony. *See* 750 ILL. COMP. STAT. 5/305 (West, Westlaw through P.A. 101-628); MINN. STAT. § 518.055 (West, Westlaw through Jan. 1, 2020 Leg.); MONT. CODE ANN. § 40-1-404 (West, Westlaw through 2019 Sess.).

192. Blakesley, *supra* note 191, at 22.

to the marriage and the marriage was valid and proper."[193] Establishing the first element is fairly straightforward. The second element, however, is often disputed. State courts applying this doctrine have defined good faith as an "honest and reasonable belief that the marriage was valid at the time of the ceremony."[194] While some states measure reasonable belief using both objective and subjective considerations,[195] other states measure reasonable belief subjectively, considering only the individual's state of mind relative to the circumstances.[196] When the couple held a wedding ceremony, courts presume good faith such that any party asserting lack of good faith has the burden of proving bad faith.[197] To rebut this presumption, asserting parties must show that their partner had reliable information demonstrating the invalid nature of the marriage yet failed to fulfill the duty to investigate with reasonable precaution.[198] Regarding the reliability of information, "unconfirmed rumors or mere suspicions of a legal impediment do not vitiate good faith, 'so long as no certain or authoritative knowledge of some legal impediment comes to [the claiming party].'"[199]

Ultimately, the primary purpose of the putative spouse doctrine is to "avoid depriving innocent parties who believe in good faith that they are married from being denied the economic and status-related benefits of marriage, such as property division, pension, and health benefits."[200]

193. *Williams*, 97 P.3d at 1128.

194. Hicklin v. Hicklin, 509 N.W.2d 627, 628 (Neb. 1994) (first citing Funderburk v. Funderburk, 38 So. 2d 502, 504 (La. 1949); and then citing Mara v. Mara, 452 So. 2d 329, 332 (La. Ct. App. 1984)). *See also* Alfonso v. Alfonso, 739 So. 2d 946, 948 (La. Ct. App. 1999) ("'Good faith' is defined as an honest and reasonable belief that the marriage was valid and that no legal impediment to it existed.") (quoting Saacks v. Saacks, 688 So. 2d 673, 676 (La. Ct. App. 1997)).

195. *In re* Marriage of Vryonis, 248 Cal. Rptr. 807, 812 (Cal. Ct. App. 1988) ("While a trial court may be tempted to base a finding of putative spousal status merely on the subjective good faith in a valid marriage held by a credible and sympathetic party, more is required. 'Good faith belief' is a legal term of art, and in both the civil and criminal law a determination of good faith is tested by an objective standard."), *overruled by* Ceja v. Rudolph & Sletten, Inc., 302 P.3d 211, 221 n.12 (Cal. 2013).

196. *Ceja*, 302 P.3d at 213 ("We conclude . . . . [t]he good faith inquiry, however, does not call for application of a reasonable person test, and a belief in the validity of a marriage need not be objectively reasonable."); Xiong v. Xiong, 800 N.W.2d 187, 191 (Minn. Ct. App. 2011) ("We reject [an argument that good faith is tested by an objective standard] because in Minnesota, 'good faith' is judged subjectively . . . .").

197. *Hicklin*, 509 N.W.2d at 631–32 (first quoting *Funderburk*, 38 So. 2d at 504; and then quoting *Mara*, 452 So. 2d at 332).

198. *See Williams*, 97 P.3d at 1128 (citing Garduno v. Garduno, 760 S.W.2d 735, 740 (Tex. Ct. App. 1988)). Specifically, "a party alleging good faith can not [sic] close her eyes to information or her ears to suspicious circumstances. She must not act blindly or without reasonable precaution." Succession of Chavis, 29 So. 2d 860, 863 (La. 1957).

199. *Williams*, 97 P.3d at 1128 (citing Garduno v. Garduno, 760 S.W.2d at 740).

200. *Id.* (citing Cortes v. Fleming, 307 So. 2d 611, 613 (La. 1973)).

Although aspects of the putative spouse doctrine resemble common law marriage, the doctrines are mutually exclusive and rather dissimilar in application. Unlike the doctrine of common law marriage, an element of the putative spouse doctrine requires that "the parties . . . actually attempted to enter into a formal [and statutorily-based] relationship with the solemnization of a marriage ceremony."[201] Even if a state has abolished common law marriage out of concern for the inviolability of formal marriage, subsequent adoption of the putative spouse doctrine does not undercut such a decision. Rather, "[a]s a majority of [the adopting] states have recognized, the sanctity of marriage is not undermined, but rather enhanced, by the recognition of the putative spouse doctrine."[202]

Although the South Carolina Supreme Court has expressly "declined to adopt the putative spouse doctrine 'as it is contrary to South Carolina's statutory law and marital jurisprudence,'"[203] other states have adopted—both legislatively and judicially—the doctrine or an analogue thereof in the wake of common law marriage abolishment.[204] Since other states have adopted the putative spouse doctrine as a solution for the inequities following a common law marriage abolishment, the doctrine is ripe for revisiting after *Stone*. Due to the pragmatics of the good faith exception, however, its recognition is an enhanced alternative compared to the putative spouse doctrine for two primary reasons. First, unlike the putative spouse doctrine, the good faith exception does not terminate upon discovery of an impediment,[205] and second, the good faith exception does not expressly require a ceremony.[206] Thus,

201. *Id.*

202. *Id.*

203. Hill v. Bell, 405 S.C. 423, 426, 747 S.E.2d 791, 792–93 (2013).

204. *See, e.g.*, Velez v. Smith, 48 Cal. Rptr. 3d 642, 656 (Cal. Ct. App. 2006) ("Under the putative spouse doctrine, 'Where a *marriage* is invalid due to some legal infirmity, an innocent party may be entitled to relief under the putative spouse doctrine.'" (emphasis added) (quoting Estate of DePasse, 118 Cal. Rptr. 2d 143, 155 (Cal. Ct. App. 2002))); Fonoti v. Fonoti, A17-0091, 2018 WL 2187358, at *1 (Minn. Ct. App. May 14, 2018) ("[W]hen a person in a cohabiting relationship mistakenly, but in good faith, believes that he or she is married, the putative-spouse statute may apply."); *Williams*, 97 P.3d at 1128 ("Under the putative spouse doctrine, when a marriage is legally void, the civil effects of a legal marriage flow to the parties who contracted to marry in good faith."); Buckley v. Buckley, 96 P. 1079, 1081 (Wash. 1908) ("Where a woman in good faith enters into a marriage contract with a man, and they assume and enter into the marriage state pursuant to any ceremony or agreement . . . which marriage would be legal except for the incompetency of the man which he conceals from the woman, a status is created which will justify a court . . . [assumption of] marriage contract upon complaint of the innocent party . . . .").

205. Weathers v. Bolt, 293 S.C. 486, 489, 361 S.E.2d 773, 774 (Ct. App. 1987) ("[I]f the parties enter into a contract of marriage believing in 'good faith' that they are capable of marrying and after the removal of all impediments[,] they continue the relationship, they are considered man and wife from the date they became free to marry.").

206. *See* Thomas v. 5 Star Transp., 412 S.C. 1, 15–17, 770 S.E.2d 183, 191 (Ct. App. 2015).

despite the court's aversion for the putative spouse doctrine, the good faith exception, although underdeveloped, will inevitably provide a superior remedy for South Carolina couples.

C. Palimony

The landmark case of *Marvin v. Marvin*[207] brought copious attention to the California Supreme Court due to its novel creation of an independent remedy for the cohabitants who did not enter into an express contract. Specifically, the court noted that the parties' conduct "demonstrate[d] an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding between the parties."[208] Scholars later acknowledged this remedy as "palimony,"[209] upon which "the formation of a marital-type relationship between unmarried persons may, legitimately and enforceably, rest upon a promise by one to support the other."[210] According to palimony cases, consideration in the implied contract is simply participation in a unique cohabitating relationship—each party forms an informal union of cohabitation that demonstrates the parties' intent to share in collective financial efforts, property, and assets.[211]

Palimony is distinctive in that, unlike the putative spouse doctrine and the good faith exception, a court does not require intent to be married at any point.[212] Rather, the parties can intend merely to be cohabitants whereby the nature of their relationship suggests a joint, quasi-marital effort that does not "rest upon illicit meretricious consideration."[213] In *Marvin*, the couple in fact had an express agreement.[214] However, recognizing the inequities that would arise from identical circumstances where a couple did not have an express contract, the California Supreme Court decided to create an independent recovery doctrine.[215] The *Marvin* court's primary policy consideration was

207. Marvin v. Marvin, 557 P.2d 106, 121 (Cal. 1976).

208. *Id.* at 122.

209. *See* STUCKEY, *supra* note 19, at 57.

210. *In re* Estate of Roccamonte, 808 A.2d 838, 844 (N.J. 2002).

211. *See id.* at 844–45 ("Whatever other consideration may be involved, the entry into such a relationship and then conducting oneself in accordance with its unique character is consideration in full measure.").

212. *See Marvin*, 557 P.2d at 121 ("[A]lthough parties to a nonmarital relationship obviously cannot have based any expectations upon the belief that they were married, other expectations and equitable considerations remain.").

213. *Id.* at 116.

214. *Id.* at 110.

215. *See id.* at 118 ("[Prior case law] exhibit[s] a schizophrenic inconsistency. By enforcing an express contract between nonmarital partners unless it rested upon an unlawful consideration, the courts applied a common law principle as to contracts. Yet the courts

that "adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."[216] Although an undoubtedly unique benefit to cohabiting couples, the adoption of palimony as an independent remedy is rare. In fact, since *Marvin*, one state has adopted palimony as a common law doctrine, only to be later overturned by its legislature.[217]

South Carolina has never awarded palimony to a cohabitating couple, so the determination remains open in the wake of the abolishment of common law marriage. However, due to South Carolina's general aversion to adopting a rarely implemented doctrine, the state will likely not adopt the remedy of palimony. In South Carolina, the only comparatively relevant case to *Marvin* is the 1941 case of *Grant v. Butt*.[218] In *Grant*, the South Carolina Supreme Court declined to enforce a cohabitation agreement where an unmarried woman agreed to cohabitate with an unmarried man in exchange for his making her a beneficiary of his life insurance policy.[219] Although *Grant* does provide a rough guide approximating South Carolina's judicial reaction to cases of implied contracts for palimony,[220] the era in which *Grant* was decided lends much credence to the argument that gender influences, meretricious consideration, and a general revulsion against cohabitation were primary concerns of the court.

There is a prominent benefit to the recognition of palimony as compared to the good faith exception, however. Whereas the good faith exception protects otherwise invalid marriages, the remedy of palimony acknowledges that cohabitation is not inherently marital and offers a completely neutral

disregarded the common law principle that holds that implied contracts can arise from the conduct of the parties.").

216. *Id.* at 116.

217. Kozlowski v. Kozlowski, 403 A.2d 902, 906–07 (N.J. 1979) ("Whether we designate the agreement reached by the parties . . . to be express, as we do here, or implied is of no legal consequence. . . . We conclude that the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed."). *Kozlowski* was superseded in 2010 by statute. *See* N.J. STAT. ANN. § 25:1-5 (West 2009 through L.2019, c. 303 and J.R. No. 22) ("No action shall be brought upon any of the following agreements or promises, unless the agreement or promise . . . shall be in writing, and signed by the party to be charged therewith . . . . A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination.").

218. Grant v. Butt, 198 S.C. 298, 17 S.E.2d 689 (1941).

219. *See id.* at 298, 17 S.E.2d at 690, 694.

220. *See id.* at 304, 17 S.E.2d at 692 ("This contract strikes at the sanctity of the home, the security of family relationships, . . . and at moral standards that have been recognized and enforced, voluntarily and by compulsion of law, since the foundation of this republic.").

remedy independent of marriage.[221] Because the *Stone* court expressed its primary concern for the uniformity and predictability of marriage itself, the court may be less reluctant to adopt a remedy of palimony because it recognizes that cohabitation and marriage are mutually exclusive and not synonymous.[222]

Rather than being fixated on the existence of marriage, palimony is concerned with equity. Determining the equitable solution in a case of cohabitation is far less complex than untangling intent in a case of possible common law marriage. If the South Carolina Supreme Court decided to adopt palimony, a trial court would dedicate its analysis simply to ascertaining whether two individuals cohabitated in such a manner that terminating their relationship would create turmoil. If so, palimony may be appropriate, and if not, palimony is not appropriate. Nonetheless, if faced with the rare recognition of palimony as compared to the already-recognized good faith exception, South Carolina will likely reject the former in preference for the latter.

VI. CONCLUSION

The South Carolina Supreme Court's decision in *Stone v. Thompson* will inevitably mark South Carolina history as one of the most revolutionary departures from this state's long-standing doctrine of common law marriage. The considerations of paternalistic underpinnings, albeit valid, are highly overstated in the court's opinion. Although originally developed solely as a remedy for dependent women, the purpose of common law marriage has shifted. No longer is the benefit of this type of marriage solely conditioned on the dependency of a woman. Rather, under the modern doctrine of common law marriage, both men and women equally obtain marital benefits in cases of divorce or tragedy where it may be too late to obtain a formal marriage.

As it stands, our country, particularly in its southern states where informality often constitutes normative social mores, is at a crossroad in determining marital rights, freedoms, and responsibilities. There is no doubt the past decade has ushered in radical deviations from historical perceptions

221. *See In re* Estate of Roccamonte, 808 A.2d 838, 844 (N.J. 2002) ("A marital-type relationship is no more exclusively dependent upon one partner's providing maid service than it is upon sexual accommodation. It is, rather, the undertaking of a way of life in which two people commit to each other, foregoing other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical, and social, as best as they are capable. And each couple defines its way of life and each partner's expected contribution to it in its own way.").

222. Marvin v. Marvin, 557 P.2d 106, 121 (Cal. 1976) ("But, although parties to a nonmarital relationship obviously cannot have based any expectations upon the belief that they were married, other expectations and equitable considerations remain.").

of marriage. Within this modern trend is an acceptance of the implied freedom to conduct private, intimate relationships in forums with equal recognition,[223] regardless of race, sex, religious belief, or formality. Masked in the traditional notions of marriage formality, the punitive effects of *Stone* signify a vast deviation from the current trend—one that is not only unwarranted but also unjust.

Despite a conceded salutation to the legislature's power over the doctrine, the *Stone* court expressly denied legislative authority and single-handedly overhauled arguably the most profound common law institution in South Carolina. In order to effectuate an optimal result for those currently faced with an indeterminate defense against the abolishment of common law marriage, the South Carolina Supreme Court should expressly adopt and necessarily expound upon the good faith exception of *Thomas v. 5 Star Transportation.*[224] Notwithstanding the court's approach to a self-identified regulatory power, the demands of justice, equity, and integrity will eventually mandate a responsive exception to the harsh implications of *Stone*.

223. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("It suffices for us to acknowledge that adults may choose to enter upon [sexual] relationship[s] in the confines of their homes and their own private lives and still retain their dignity as free persons."). *See generally* Obergefell v. Hodges, 576 U.S. 644, 646 (2015) ("[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy.").

224. Thomas v. 5 Star Transp., 412 S.C. 1, 770 S.E.2d 183 (Ct. App. 2015).